

1 JERRY CHAVEZ,

2 Petitioner,

3 v.

4 CLARK E. DUCART, Warden,

5 Respondent.

6 Case No. [13-cv-04690-YGR](#) (PR)7 **ORDER GRANTING RESPONDENT'S
RENEWED MOTION TO DISMISS
PETITION AS UNTIMELY; AND
DENYING CERTIFICATE OF
APPEALABILITY**8
9 Petitioner Jerry Chavez, a state prisoner, filed the instant *pro se* action for a writ of habeas
10 corpus pursuant to 28 U.S.C. § 2254. Before the Court is Respondent's renewed motion to
11 dismiss the instant petition as untimely under the one-year statute of limitations established by the
12 Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d). Dkt.
13 25. Petitioner filed an opposition to the renewed motion. Dkt. 29. Respondent filed a reply. Dkt.
14 30.15 Having read and considered the papers submitted and being fully informed, the Court
16 GRANTS Respondent's renewed motion and DISMISSES the petition with prejudice.17 **I. BACKGROUND**18 As discussed in the Court's February 20, 2015 Order denying Respondent's previously-
19 filed motion to dismiss, the following procedural background is undisputed:20 On November 8, 2010, in Santa Clara County Superior Court
21 Case No. CC768276, Petitioner pled guilty to voluntary
22 manslaughter with personal use of a firearm in exchange for the
23 dismissal of a charge of felony murder. Dkt. 1 at 4. On March 11,
24 2011, he was sentenced to twenty-one years in state prison,
25 consecutive to his other pending case. Dkt. 1, Ex. F. In Santa Clara
County Superior Court Case No. 211398, Petitioner pled guilty to
conspiracy to sell drugs, conspiracy to transport drugs, and
participation in a criminal street gang. Dkt. 1 at 6. Also on March
11, 2011, he was sentenced to five years and eight months. Dkt. 1,
Ex. G. Petitioner did not appeal the aforementioned convictions.26 On July 17, 2012,¹ Petitioner filed his first state habeas
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¹ A *pro se* federal or state habeas petition is deemed filed on the date it is delivered to
prison authorities for mailing. See *Saffold v. Newland*, 250 F.3d 1262, 1268 (9th Cir. 2001),

United States District Court
Northern District of California

1 petition in the California Supreme Court, which was denied on
2 November 14, 2012. Dkt. 15, Ex. 1 (Case No. S204213).

3 On September 13, 2012, Petitioner filed a second state
4 habeas petition in the California Supreme Court, which was denied
5 on November 14, 2012, with a citation to *In re Dexter*, 25 Cal. 3d
6 921, 925-926 (1979) (petitioner must exhaust administrative
7 remedies for claim). Dkt. 15; Ex. 2 (Case No. S205377).

8 On October 25, 2012, Petitioner filed a motion to modify the
9 restitution fines in the Santa Clara County Superior Court, which
10 was denied on October 29, 2012, as waived, untimely, and for lack
11 of jurisdiction. Dkt. 1, Ex. N.

12 On December 12, 2012, Petitioner filed a state habeas
13 petition in the California Court of Appeal, which was denied on
14 January 18, 2013. Dkt. 15, Ex. 3 (Case No. H039100).

15 On March 14, 2013, Petitioner filed his third state habeas
16 petition in the California Supreme Court, which was denied on May
17 15, 2013. Dkt. 15, Ex. 4 (Case No. S209369).

18 On December 30, 2013, Petitioner filed another habeas
19 petition in the California Court of Appeal, which was denied on
20 February 21, 2014. Dkt. 15, Ex. 5 (Case No. H040507). The denial
21 order noted that to the extent Petitioner was claiming he was
22 improperly validated as a gang member, the petition was denied
23 without prejudice to allow him to exhaust administrative remedies.
Id.

24 On September 4, 2013,² Petitioner filed the instant federal
25 petition, alleging in part that the trial court improperly imposed
26 restitution fines in his two cases and breached the terms of the plea
27 agreement, and that his attorney was ineffective for failing to object
28 to the restitution fines. Dkt. 1 at 4-6.³

Dkt. 22 at 1-2 (footnotes in original and renumbered).

On November 26, 2013, the Court issued an order to show cause. Dkt. 10. On March 26, 2014, in lieu of an answer, Respondent moved to dismiss the petition as untimely. Dkt. 15. After full briefing by the parties, the Court issued an order finding that the petition “barred as untimely”

vacated and remanded on other grounds, Carey v. Saffold, 536 U.S. 214 (2002) (holding that a federal or state habeas petition is deemed filed on the date the prisoner submits it to prison authorities for filing, rather than on the date it is received by the court). Petitioner signed his first state supreme court petition and his federal habeas petition on July 17, 2012 (Dkt. 15 at note 1) and September 4, 2013 (Dkt. 1 at 7), respectively. For the purposes of this discussion, the Court deems those petitions as filed on those dates. See *Saffold*, 250 F.3d at 1268.

² See *supra* note 2.

³ Page number citations refer to those assigned by the Court’s electronic case management filing system and not those assigned by Petitioner.

1 under 28 U.S.C. § 2244(d)(1) unless he can show that he is entitled to . . . equitable tolling.”⁴ Dkt.
2 22 at 6. In his opposition to the motion, Petitioner had argued that he is entitled to equitable
3 tolling on the grounds that his lack of access to the law library contributed to his delay in filing his
4 federal petition. Dkt. 16 at 1-2. However, the Court found that Respondent had not adequately
5 addressed that argument. Dkt. 22 at 10. Consequently, the Court denied the motion to dismiss the
6 petition as untimely, without prejudice to Respondent’s renewing the motion and addressing
7 equitable tolling. *Id.*

8 In the instant renewed motion to dismiss, Respondent renews the argument that all of the
9 claims in the petition are untimely and addresses the matter of equitable tolling. Dkt. 25 at 3-6.
10 On July 27, 2015, Petitioner filed an opposition. Dkt. 29. On August 10, 2015, Respondent filed
11 a reply. Dkt. 30.

12 II. DISCUSSION

13 A. Overview

14 AEDPA, effective April 24, 1996, imposes a limitations period on petitions for a writ of
15 habeas corpus filed by state prisoners. In prisoner actions challenging non-capital state
16 convictions or sentences, a habeas petition must be filed within one year of, *inter alia*, the date the
17 judgment became final after the conclusion of direct review or the time passed for seeking direct
18 review. 28 U.S.C. § 2244(d)(1). If a petitioner could have sought review by the state court of
19 appeals or the state supreme court, but did not, the limitation period will begin running against
20 him the day after the date on which the time to seek such review expired. *See Smith v. Duncan*,
21 297 F.3d 809, 812-13 (9th Cir. 2002) *overruled on other grounds by Pace v. DiGuglielmo*, 544
22 U.S. 408, 418 (2005); *see also* Cal. Rule of Court 8.308(a) (providing that appeal from criminal
23 judgment must be filed within sixty days after rendition of judgment or making of order being
24 appealed) (formerly Cal. Rule of Court 31).

25 _____
26 ⁴ The Court previously found that statutory tolling was not sufficient to overcome the time
27 bar to Petitioner’s federal habeas petition. Dkt. 22 at 4. The Court also rejected Petitioner’s
28 argument that he was entitled to a delayed commencement of the limitations period because,
among other reasons, he did not exercise due diligence in discovering the factual predicate of his
claims and thus was not entitled to such a delayed start of the limitations period under 28 U.S.C.
§ 2254(d)(1)(D). *Id.* at 5-6.

1 In the present case, the statute of limitations started running on May 10, 2011, when
2 Petitioner's judgment became final sixty days after his March 11, 2011 sentencing. *See*
3 § 2244(d)(1)(A); Cal. Rule of Court 8.308(a). Thus, Petitioner had one year or until May 10, 2012
4 to file his federal habeas petition. *See* 28 U.S.C. § 2244(d).

5 Petitioner did not file the present petition until September 4, 2013, almost a year and four
6 months after the limitations period had expired. The petition is therefore untimely unless
7 Petitioner can show that he is entitled to equitable tolling.⁵

8 **B. Standard for Equitable Tolling**

9 The Supreme Court has determined that AEDPA's statute of limitations is subject to
10 equitable tolling in appropriate cases. *Holland v. Florida*, 560 U.S. 631, 645 (2010). "When
11 external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely
12 claim, equitable tolling of the statute of limitations may be appropriate." *Miles v. Prunty*, 187
13 F.3d 1104, 1107 (9th Cir. 1999). However, equitable tolling is unavailable in most cases because
14 extensions of time should be granted only if "'extraordinary circumstances' beyond a prisoner's
15 control make it impossible to file a petition on time." *See Calderon v. United States Dist. Court
(Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997) (citation omitted), *overruled in part on other
grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc).
16 The party seeking equitable tolling bears the burden of establishing two elements: "(1) that he has
17 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
18 way," preventing timely filing. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). "[T]he threshold
19 necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the
20 rule." *Id.* at 1066 (internal quotations and citation omitted). At the same time, "[r]ather than let
21 procedural uncertainties unreasonably snuff out a constitutional claim, the issue of when grave
22 difficulty merges literally into 'impossibility' should be resolved in [a petitioner's] favor." *Lott v.
Mueller*, 304 F.3d 918, 920 (9th Cir. 2002). When a prisoner is proceeding *pro se*, his allegations
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⁵ As mentioned above, the Court previously found that the time bar to Petitioner's federal
28 habeas petition could not be overcome by statutory tolling, and that Petitioner was not entitled to a
delayed commencement of the limitations period. Dkt. 22 at 4-6.

1 regarding diligence in filing a federal petition on time must be construed liberally. *Roy v.*
2 *Lampert*, 465 F.3d 964, 970 (9th Cir. 2006).

3 **C. Analysis**

4 As mentioned above, the Court has found that the instant federal petition filed on
5 September 4, 2013 is untimely by almost a year and four months. Petitioner has previously sought
6 equitable tolling based on his lack of law library access. Specifically, Petitioner claimed that he
7 was confined in the administrative segregation unit of North Kern State Prison (“NKSP”) from
8 March 23, 2011 through May 15, 2012, during which time he had no access to the law library.
9 Dkt. 16 at 1-2. Petitioner added that on May 15, 2012, he was transferred from NKSP to the
10 California Correctional Institution and that “this was the first time [he] had regular access to the
11 legal library and/or legal resource material to file with the courts.” *Id.* at 6.

12 The Court conducted the following calculation to determine whether granting Petitioner
13 equitable tolling—from the relevant time frame of May 10, 2011 (when the limitations period
14 started to run) until May 15, 2012 (when he regained access to the law library)—would save his
15 petition from being untimely:

16 If the statute of limitations had started to run on the date he regained
17 law library access on May 15, 2012, then Petitioner would have had
18 one year—or until May 15, 2013—to file his federal habeas petition.
19 Petitioner could be entitled to statutory tolling because his first state
20 supreme court petition was filed on July 17, 2012, prior to the
21 limitations period expiring. Before filing his first state supreme
22 court petition on July 17, 2012, the limitations period would have
23 run unabated for a total of 63 days (from May 15, 2012 through July
24 17, 2012). Petitioner would have been entitled to statutory tolling
25 during the almost four-month period during which his state supreme
26 court petition was pending from July 17, 2012 through November
27 14, 2012. The limitations period then would have begun to run
28 again when the state supreme court denied his petition on November
14, 2012, and it would run unabated for 294 more days until he filed
his federal petition on September 4, 2013. Therefore, only 357 days
(63 days plus 294 days) of the limitations period would have run
before his federal petition was filed. Said another way, his federal
petition could be timely because there was still 8 days (365 days
minus 357 days) of the limitations period left when he filed it. Thus,
if Petitioner could avail of equitable tolling due to lack of law
library access, his federal petition *could* be timely filed based on the
aforementioned calculation.

Dkt. 22 at 8-9.

1 In the Ninth Circuit, constitutionally acceptable means of access to the courts include the
2 provision of an adequate law library or a professional or quasi-professional legal services plan.
3 *Storseth v. Spellman*, 654 F.2d 1349, 1352 (9th Cir. 1981) (citing *Bounds v. Smith*, 430 U.S. 817,
4 831 (1977)). In *Lewis v. Casey*, 518 U.S. 343 (1996), the Supreme Court restricted the scope of
5 *Bounds*, clarifying that it created only a right of “access to the courts,” not an “abstract,
6 freestanding right to a law library or legal assistance.” *Id.* at 350-351. “[P]rison law libraries and
7 legal assistance programs are not ends in themselves, but only the means for ensuring ‘a
8 reasonably adequate opportunity to present claimed violations of fundamental constitutional rights
9 to the courts.’” *Id.* at 351. The Supreme Court rejected the notion that federal courts can mandate
10 specific hours of library availability for state prisoners, and held that although prisoners on
11 lockdown may experience delays in receiving legal materials, where such delays are related to
12 legitimate penological interests they have “no constitutional significance.” *Id.* at 361-362. The
13 Supreme Court emphasized that it is the capability to challenge a conviction, “rather than the
14 capability of turning pages in a law library, that is the touchstone” of the right to access. *Id.* at
15 356. Furthermore, “ordinary prison limitations on . . . access to the law library and copier” do not
16 constitute extraordinary circumstances or make it impossible to file a federal petition on time.
17 *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009) (internal quotation marks and citations
18 omitted); *see, e.g., Chaffer v. Prosper*, 592 F.3d 1046, 1049 (9th Cir. 2010) (per curiam)
19 (prisoner’s *pro se* status, law library missing a “handful” of reporter volumes, and reliance on
20 inmate helpers who were transferred or too busy to attend to his petitions are not extraordinary
21 circumstances “given the vicissitudes of prison life”). However, in the present action, the Court
22 still found it “conceivable that equitable tolling might be warranted because Petitioner was
23 prevented from preparing a timely petition due to his lack of access to the law library.” Dkt. 22 at
24 9. The Court further found that Respondent “did not fully address this issue in his reply to
25 Petitioner’s opposition,” stating:

26 Respondent merely refers to an August 8, 2011 letter from
27 Petitioner’s attorney and states that it showed that Petitioner had the
28 “ability to conduct legal research and prepare a claim during the
relevant period.” Dkt. 18 at 3. Such an argument is conclusory, and
Respondent fails to address Petitioner’s claim that his lack of access

1 to the law library prevented him from filing a timely petition. In
2 support of his claim, Petitioner alleges that while he was housed in
3 administrative segregation at NKSP, “inmates didn’t have physical
4 entry access into a facility law library for the purpose of using its
legal resources.” Dkt. 16 at 2. As mentioned above, Respondent
has failed to refute Petitioner’s allegations that he was denied law
library access during that time.

5 Dkt. 22 at 9-10.

6 In the renewed motion to dismiss, Respondent again argues that Petitioner is not entitled to
7 equitable tolling. First, Respondent clarifies that the aforementioned August 8, 2011 letter was not
8 written by Petitioner’s attorney, and that it was actually written by Petitioner and “reproduced” by
his attorney, stating:

9 We argued that petitioner’s “reproduced” letter to his attorney dated
10 August 8, 2011, which was during the time period when petitioner
11 contended he was totally stymied due to lack of library access,
demonstrated that he was actually able to conduct legal research
during that time, because the letter set forth a coherent claim
concerning conduct credits and cited a number of supporting cases.
Doc. 18 at 3, citing Opp., Exh. D. However, this Court erroneously
believed the letter was from petitioner’s attorney. Doc. 22 at 9-10.
We reiterate here that the letter showed petitioner’s ability to
research his claims during the relevant time period.

15 Dkt. 25 at 5 note 4 (citations omitted). Second, in response to the Court’s request to address
16 Petitioner’s claim that his lack of access to the law library *prevented* him from filing a timely
17 petition, counsel for Respondent has

18 . . . obtained documentation from North Kern State Prison that
19 conclusively refutes petitioner’s contention. According to the
20 prison’s Operations Manual, inmates housed in administrative
segregation “may access the law library resources through the
21 paging process,” whereby they request that particular legal materials
be delivered to their cells. Exh. 6. Moreover, petitioner in fact
22 obtained legal materials through the paging process no less than *nine*
times during the period in question, between March 23, 2011 and
23 May 15, 2012. Exh. 7. Specifically, petitioner received materials
24 on June 10, 2011 (4 items); August 5, 2011 (3 items); September 23,
2011; October 7, 2011 (2 items); October 14, 2011 (2 items);
January 27, 2012 (3 items); February 10, 2012; March 2, 2012 (5
25 items); and March 16, 2012 (4 items). *Id.* Therefore, petitioner
26 clearly had sufficient access to the law library before the limitations
period expired on May 12, 2012. He has not met his burden to show
that extraordinary circumstances prevented him from filing a timely
federal petition.

27 Dkt. 25 at 6 (footnote omitted). Counsel supports his aforementioned argument with prison logs
28 that he received from NKSP and attached as Exhibit 7 to the renewed motion, which consist

1 chiefly of copies of what are purportedly the logs showing Petitioner's use of the paging process
2 to obtain legal materials during the relevant time frame. Dkt. 25, Ex. 7.

3 In his opposition, Petitioner relies on *Bounds*, asserting that “[a]ccess to the court requires
4 that prison authorities assist inmates to prepare and file meaningful legal papers by providing
5 petitioner with adequate assistance from persons trained in the law.” Dkt. 29 at 9; *see Bounds*,
6 430 U.S. at 828. Petitioner concedes that he “did receive material through the paging process to
7 obtain certain material” and does not dispute that the aforementioned prison logs indicate his use
8 of such a process. Dkt. 29 at 4. Petitioner adds that some of the materials he requested included:
9 “inmate/parolee appeal CDCR 602, proof of service, trust account withdrawal order CDCR 193,
10 California Code of Regulations Title 15, Department Operational Manual – DOM, Inmate/Parolee
11 request for interview CDCR Form 22, Legal Rights of Prisoners Handbook, and Health Care
12 Services Request CDCR Form 7362 etc.” *Id.* Petitioner complains that he only “received the bare
13 minimum (i.e., outdated CCR Title 15/legal books if they were available, and Administrative
14 material) via the paging process for two hours inside the cell.” *Id.* He further argues that
15 Respondent “only vaguely accounts for the times I was provided ‘items,’ but doesn’t account for
16 times I requested paging services and did not receive [any] assistance.” *Id.* at 8. He adds the
17 “[c]orrectional officers weren’t consistent or reliable with using the paging system” *Id.*
18 Further, Petitioner points to certain time frames where inmates were “without legal help or use of
19 the paging process” in “April-May 2011 (no legal assistance); July 2011 (no legal assistance);
20 November-December 2011 (no legal assistance); and April-May 2012 (no legal assistance).” *Id.*
21 at 7. Finally, Petitioner contends he did not have access to the “Law Library Electronic Data
22 System (LLEDS) computers loaded with electronic copies of legal titles accessible for inmates
23 during [his] incarceration of 3-23-2011 to 5-15-2012.” *Id.* at 6. Petitioner claims the LLEDS
24 computers were finally installed “inside until D6 Ad/Seg holding cages as of 2014, which
25 functions as a law library.” *Id.* at 7.⁶

26 _____
27 ⁶ The Court finds Petitioner’s remaining arguments in his opposition unavailing.
28 Petitioner’s argument that he “was not aware of the statute of limitations” is contradicted by the
fact that he has admitted that he “clearly” understood the one-year statute of limitations
requirement. Compare Dkt. 29 at 1-2 with *id.* at 8-9. Moreover, Petitioner fails to support his

1 Meanwhile, Respondent argues that “regardless whether petitioner personally visited the
2 library or had access to a computer, he clearly had sufficient “access to the courts” as
3 contemplated by *Lewis* and *Ramirez*.² Dkt. 30 at 2. Furthermore, Respondent argues that
4 Petitioner “fails to identify any particular document that he was unable to obtain in a timely
5 manner through the paging system and that he believes was necessary in order to present his
6 claim; consequently, he cannot show that the restrictions on library access proximately caused his
7 late filing.” *Id.* (citing *Chaffer v. Prosper*, 592 F.3d 1046, 1049 (9th Cir. 2010); *Waldron-Ramsey*
8 v. *Pacholke*, 556 F.3d 1008, 1013-1014 (9th Cir. 2009)). Respondent points out that the “[f]ailure
9 to show that a ‘nonfrivolous legal claim had been frustrated’ is fatal to [Petitioner’s] *Bounds*
10 claim.” *Id.* at 2 (citing *Alvarez v. Hill*, 518 F.3d 1152, 1155 (9th Cir. 2008)). Therefore,
11 Respondent contends that Petitioner “has not met his burden to show that he is entitled to
12 equitable tolling.” *Id.* at 2-3 (citing *Holland*, 560 U.S. at 649; *Yeh v. Martel*, 751 F.3d 1075, 1077
13 (9th Cir. 2014) (“This is a very high bar, and is reserved for rare cases.”)).

14 Upon reviewing the record, this Court agrees with Respondent that Petitioner had law
15 library access through the paging process, and notes that Petitioner conceded to taking advantage
16 of it during the relevant time period. Petitioner also acknowledged that the “paging system
17 consisted of in cell studies for two hours,” but argues that “[t]he inability to research legal books,
18 legal materials, or obtain regular access to the law library on a weekly basis did restrict
19 Petitioner[’s] adequate assistance, which did cause harm.” Dkt. 29 at 8 (citation omitted).
20 However, Petitioner has made conclusory allegations relating to his need for *physical* law library
21 access, and he fails to elaborate why the paging process was insufficient. As Respondent has
22 previously pointed out, Petitioner’s August 8, 2011 letter—written three months after the statute of
23 limitations commenced (on May 10, 2011)—indicated that he wished to pursue a legal claim, and
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25 argument by showing evidence that the prison law library did not have a copy of 28 U.S.C. § 2244
26 in 2011—fifteen years after AEDPA was enacted in 1996. Equally unavailing is Petitioner’s
27 argument that the prison staff could not provide him with the mailing addresses necessary for him
28 to mail his state habeas petitions. *Id.* at 5-6. Petitioner claims that he did not obtain the necessary
addresses until his appellate counsel provided them to him on March 5, 2012. *Id.* However,
Petitioner provides no supporting evidence that the prison was unable to provide these addresses.
Moreover, Petitioner fails to explain why he did not ask his appellate counsel for these addresses
sooner, if in fact he could not obtain them from prison staff or other legal materials.

1 alerted his attorney that “all necessary paperwork is enclosed,” and “all necessary legal documents
2 are here to support my argument.” Dkt. 16, Ex. D. In Petitioner’s attached declaration, he shows
3 that he was able to set forth a coherent claim concerning conduct credits, and he cited a number of
4 supporting cases. *Id.* Therefore, the Court agrees that Petitioner’s August 8, 2011 letter
5 demonstrates his ability to conduct legal research and prepare a legal claim during the relevant
6 time period. Petitioner’s attorney timely responded on September 4, 2011 with instructions that
7 Petitioner brought up “legal issues” which he would have to “pursue [] with appellate or habeas
8 counsel.” Dkt. 29 at 21. The record indicates that while Petitioner lacked physical access to the
9 law library from March 23, 2011 through May 15, 2012, he had access to the paging system
10 during that relevant time frame, and that he made use of the paging process. Even though
11 Petitioner claims he had problems because he only received the “bare minimum” of legal materials
12 through the paging process, he fails to show diligence in pursuing his claims because he allowed
13 *six months* to pass from September 2011 until March 2012, when he contacted his appellate
14 attorney relating to his state habeas petitions. Dkt. 29 at 13-14. The record shows that on March
15 5, 2012—two months before the limitations period expired on May 10, 2012—Petitioner’s
16 appellate counsel responded to Petitioner’s March 1, 2012 letter, recommended that Petitioner file
17 his state appellate and supreme court petitions, and included the necessary court addresses. Dkt.
18 29 at 13-14. The appellate attorney also explained that the deadline for the state appellate court
19 petition was April 22, 2012. *Id.* at 13. Instead of immediately filing his state habeas petition,
20 Petitioner waited over *four months* before filing his first state habeas petition in the California
21 Supreme Court on July 17, 2012. Dkt. 15, Ex. 1 (Case No. S204213). Thus, it seems that even
22 though Petitioner has argued that he lacked *physical* law library access and such a limitation
23 prevented him from filing a timely federal petition, Respondent rebuts such an allegation by:
24 (1) showing evidence of Petitioner’s efforts to avail of law library access through the paging
25 process and (2) arguing that it was Petitioner’s lack of diligence as opposed to his limited access to
26 the law library that was the cause of his untimeliness. In addition, Petitioner has never explained
27 why *physical* access to the law library was necessary at all in the timely filing of his petition.
28 Furthermore, Petitioner does not deny he was in possession of his state court record, and thus

1 presumably he could have prepared the bulk of the state and federal habeas petitions he filed
2 within his cell. In sum, Petitioner fails to show either that he has been diligent or that
3 “extraordinary circumstances” stood in his way and prevented a timely filing.

4 Lastly, in his opposition to the renewed motion, Petitioner does not dispute that his petition
5 is untimely, instead he stresses that aside from his limited access to the law library, he was in need
6 of “adequate assistance from persons trained in the law.” Dkt. 29 at 9. The Court construes the
7 aforementioned as Petitioner’s renewed argument that he is entitled to equitable tolling based on
8 his *pro se* status and alleged lack of intelligence. As mentioned in the Court’s Order denying the
9 previously-filed motion to dismiss, “ignorance of the law and lack of legal sophistication do not
10 alone constitute extraordinary circumstances warranting equitable tolling.” Dkt. 22 at 8 footnote 5
11 (citing *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006)). When accompanied with the
12 fact that Petitioner’s law library access was limited, such circumstances could arguably be
13 considered “extraordinary.” However, “it is important to note that the standard for equitable
14 tolling requires both the presence of an *extraordinary circumstance* and the inmate’s exercise of
15 *diligence*.” *Holland*, 560 U.S. at 649; *Pace*, 544 U.S. at 418. At the time the Court denied
16 Respondent’s previously-filed motion to dismiss, the question of Petitioner’s diligence was
17 unclear. However, after further factual development of the record, the Court has found above that
18 Petitioner has failed to show that he exercised the requisite diligence in attempting to file a timely
19 petition. Thus, without the requisite presence of an *extraordinary circumstance* and Petitioner’s
20 exercise of *diligence*, Petitioner’s allegation of his *pro se* status alone does not entitle him to
21 equitable tolling. *Rasberry*, 448 F.3d at 1154; cf. *Cantu-Tzin v. Johnson*, 162 F.3d 295, 299-300
22 (5th Cir. 1998) (*pro se* status during state habeas proceedings did not justify equitable tolling);
23 *United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993) (*pro se* status, illiteracy, deafness and
24 lack of legal training not external factors excusing abuse of the writ).

25 In conclusion, the Court finds that Petitioner’s *pro se* status and his limited access to the
26 prison law library did not make it impossible for him to file a federal petition on time, *Beeler*, 128
27 F.3d 1288; nor were they the cause of his untimeliness, *Pace*, 544 U.S. at 418. Accordingly,
28 Respondent’s renewed motion to dismiss is GRANTED.

1 **III. CERTIFICATE OF APPEALABILITY**

2 The federal rules governing habeas cases brought by state prisoners have been amended to
3 require a district court that dismisses or denies a habeas petition to grant or deny a certificate of
4 appealability (“COA”) in its ruling. *See Rule 11(a), Rules Governing § 2254 Cases, 28 U.S.C.*
5 *fol. § 2254 (effective December 1, 2009).*

6 For the reasons stated above, Petitioner has not shown “that jurists of reason would find it
7 debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529
8 U.S. 473, 484 (2000). Accordingly, a COA is DENIED.

9 **IV. CONCLUSION**

10 For the reasons stated above,

11 IT IS HEREBY ORDERED THAT:

12 1. Respondent’s renewed motion to dismiss petition (dkt. 25) is GRANTED, and the
13 petition is DISMISSED with prejudice.

14 2. A certificate of appealability is DENIED. Petitioner may seek a certificate of
15 appealability from the Ninth Circuit Court of Appeals.

16 3. The Clerk of the Court shall enter judgment, terminate all pending motions, and
17 close the file.

18 4. This Order terminates Docket No. 25.

19 IT IS SO ORDERED.

20 Dated: December 4, 2015



21 YVONNE GONZALEZ ROGERS
22 United States District Judge